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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-529

THE CHURCH OF SCIENTOLOGY OF CALIFORNIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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The government fails to respond to the central question raised by this case: whether a party not subject to a criminal prosecution has a right to full judicial review, including appellate review, of the legality of the government's seizure of that party's private papers. The question does not involve the proper scope or application of the exclusionary rule.[1] Rather, it involves the fundamental

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[1] Thus the government's reliance on *United States* v. *Calandra*, 414 U.S. 338 is wholly inappropriate. *Calandra* held that the exclusionary rule does not apply to grand jury proceedings. It did not purport to hold that the *only* legal remedy for an unlawful search and seizure is the exclusion of the evidence at a criminal trial. Indeed, such a doctrine would put the cart before the horse. The core protection of the Fourth Amendment is to prevent improper intrusions by the government into privacy interests. *Katz* v. *United States*, 389 U.S. 347. *Calandra* itself makes clear that the exclusionary rule is applied as a protective device to discourage Fourth Amendment violations. It never was intended to be the *only* remedy for such violations. See *Bivens* v. *Six Unnamed Agents*, 403 U.S. 388.

rights of a party to obtain return of its private and privileged papers which were illegally seized.

United States v. *Ryan,* 402 U.S. 530, and the cases cited at pages 9-11 of the Petition, all stand for the proposition that a party not subject to criminal proceedings may litigate the issue of the legality of the seizure of its papers under Rule 41(e). The government's efforts to distinguish away the clear import of the cases by reference to the final judgment rule (Brief in Opposition at 5-6) or otherwise (*id.* at 8-9, and p. 4) are disingenuous. The final judgment rule applies in cases in which a party to ongoing litigation seeks appellate review of an *interlocutory* order. Here, the petitioner seeks appellate review of an order and judgment finally dismissing its Rule 41(e) motion and assessing costs against it. It is a party to no ongoing criminal litigation involving the documents at issue. The final judgment rule is no bar to its appeal.

Indeed, recent events in the criminal proceedings entitled *United States* v. *Hubbard, et al.,* 78-401 (D.D.C.) have highlighted the injury accruing to petitioner as a consequence of its inability to obtain appellate review of its Rule 41(e) motion. The nine defendants in the *Hubbard* case reached a plea disposition with the government by which they were tried before the Honorable Charles R. Richey, without a jury, upon a stipulated record of evidence. On October 26, 1979, the stipulated record was submitted to Judge Richey, and, in accordance with the plea disposition, he found each defendant guilty of a single count in the indictment. About 200 of the documents seized from petitioner during the searches in issue were made part of the stipulated record, prepared by the government, upon which the defendants were convicted.

On October 25, 1979, District Judge Richey *sua sponte* vacated the seal he had placed upon petitioner's documents

not voluntarily returned to petitioner by the government following their seizure, and released to the public and the press the approximately twenty to thirty thousand unreturned documents *not* made part of the stipulated record. The district court purported to justify its action by alluding to a "right-to-know" with respect to criminal proceedings:

> "[D]espite *dicta* in a recent Supreme Court case, this Court firmly believes that there is a right in the public to know what occurs before the courts." (Order, October 25, 1979)[2]

On October 29, 1979, petitioner filed in the district court a motion to intervene and to vacate the court's order of October 25, 1979, or, in the alternative, to stay the order pending the determination of the appeal therefrom. On November 1, 1979, the district court denied appellate's motion for leave to intervene, and on the same date commenced the release to the public and press of the thousands of petitioner's private documents which played no part in the criminal case, and the legality of whose seizure was still *sub judici* in the Ninth Circuit and in this Court.

Accordingly, petitioner has suffered and continues to suffer substantial intrusions into its privacy interests without an opportunity to obtain appellate review of the legality of the means by which the government obtained the documents. The fact that the government may have returned photocopies of the original documents to the petitioner (Brief in Opposition at 7, n.2) in no way less-

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[2] The district court was apparently referring to this Court's decision in *Gannett Co., Inc.* v. *De Pasquale,* 99 S.Ct. 2898 (July 2, 1979).

ens the substantial intrusion on petitioner's privacy rights.[3] In short, the history of this case demonstrates the compelling necessity for review of the court of appeals decision denying petitioner an appellate forum to raise its Fourth Amendment claims for return of its papers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[3] It is clear that a party aggrieved by an unlawful search and seizure is entitled to the return of both copies *and* the originals of its wrongfully taken documents. *Goodman* v. *United States*, 369 F.2d 166, 168 (9th Cir. 1966).